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Cherise Roundy Black v. Craig Barney : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHERISE ROUNDY (BARNEY) BLACK, Petitioner/Appellee/ Cross Appellant, vs. V. CRAIG BARNEY Respondent/Appellant/ Cross Appellee.	: : : : : : : : : : :	**REPLY BRIEF OF APPELLANT** Case No. 990535CA

APPEAL FROM THE DIVORCE DECREE ENTERED ON JUNE 8, 1999, BY THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY, STATE OF UTAH, JUDGE STANTON M. TAYLOR PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

I.

MS. BLACK FAILS TO ESTABLISH THAT AN AWARD OF NONTERMINABLE ALIMONY IS EQUITABLE IN THIS ACTION

Petitioner/Appellee/Cross-Appellant Cherise Roundy (Barney) Black ("Ms. Black") states that "Appellant has failed to establish the impropriety of the trial court's awarding Cherise permanent alimony." Brief of Appellee and Cross-Appellant ("Appellee's Brief") at 10. Respondent/Appellant/Cross-Appellee V. Craig Barney ("Mr. Barney") does not appeal the award of permanent alimony[1] to Ms. Black. Mr. Barney does, however, appeal the trial court's award of alimony that does not terminate upon the remarriage of Ms. Black ("nonterminable alimony"). Ms. Black's confusion between these two concepts is readily apparent in her argument that Martinez v. Martinez, 754 P.2d 69 (Utah Ct. App. 1988) is "illustrative and probative" on the issue of nonterminable alimony. Appellee's Brief at 10.

In Martinez, the trial court entered an award of alimony for a period of five years, which was nonterminable by reason of remarriage for a period of three years. Id. at 74. This Court vacated the trial court's alimony award and instead awarded

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[1]Permanent alimony is an award of alimony "on a continuing basis" or "for an indefinite period of time." Permanent alimony may terminate, however, upon the occurrence of certain statutory events such as a substantial material change in circumstances, death, remarriage or cohabitation. Utah Code Ann. § 30-3-5(7-9).

"permanent alimony in the sum of $750.00 per month subject to the provisions of Utah Code Ann. § 30-3-5 (1987)." Id. at 75. By making the award subject to the provisions of § 30-3-5, the award would terminate upon the recipient spouse's remarriage.[2] The version of Utah Code Ann. § 30-3-5, relied on by this Court in Martinez, provided:

> (5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined. Utah Code Ann. § 30-3-5(5) (1987)

Therefore, in Martinez, this Court took the trial court's alimony award, which contained a nonterminable component, and converted it to a longer term alimony award which did terminate upon the recipient spouse's remarriage. In this case, Mr. Barney is not appealing the permanent alimony award, but he is appealing the trial court's error in ordering that the award does not terminate if and when Ms. Black remarries. In relying on this Court's decision in Martinez, Ms. Black has simply confused the two distinct concepts of permanent alimony and nonterminable alimony. The plain irony of Ms. Black's reliance on this Court's opinion in Martinez is that this Court actually vacated the nonterminable

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[2] In fact, the alimony award of the district court on remand in Martinez specifically provides that alimony terminates upon the remarriage of the recipient spouse.

component of the alimony award in favor of an award that terminated upon remarriage.

The other defect of Ms. Black's argument regarding alimony is in the discussion of the parties' standard of living during the marriage. Ms. Black argues that she "will need nonterminable alimony to allow her to maintain a standard of living more in line with what she became accustomed to in the marriage." Appellee's Brief at 14. However, the trial court found that the parties' standard of living was established through their irresponsible spending habits and could not possibly be maintained. R. 132-9, R. 149, and R. 995, pp.41-42. Ms. Black now argues that her alimony should continue, despite remarriage, so that she can maintain what the trial court found to be a standard of living not supportable by the parties' income. Ms. Black's rationale flies in the face of common sense.

Finally, the award of nonterminable alimony is contrary to the public policy behind the enactment of Utah Code Ann. § 78-45-3, which provides that "every man shall support his wife when she is in need." Id. Ms. Black's new husband is now obligated to support her. Mr. Barney should not now have that same obligation. As the Utah Supreme Court noted in Openshaw v. Openshaw, 12 P.2d 364 (Utah 1932),

> it is an ancient doctrine of the common law that it is the duty of a husband to support his wife. Such is still the law of this state . . . . This duty of support does not end when the marriage is dissolved by a decree of divorce rendered at the suit of the wife for the

> husband's matrimonial wrongs; but it continues so long as they both shall live, **the wife remains unmarried** and needs such support, and the husband is able to provide the same. Id. at 368.

An award of alimony that does not terminate upon the remarriage of the recipient spouse is contrary to this fundamental legal principle. Ms. Black's desire to maintain a standard of living that the trial court found to be well beyond the parties' means cannot justify an award of alimony that continues beyond Ms. Black's remarriage. An award of nonterminable alimony in this action is not justified and is not equitable.

II.

THE TRIAL COURT FAILED TO MAKE SUFFICIENT FINDINGS BECAUSE NO EVIDENCE WAS PRESENTED AT TRIAL REGARDING THE CHILDREN'S NEED FOR CHILD SUPPORT ABOVE THE STATUTORY GUIDELINE AMOUNT

Ms. Black next asserts that the evidence is "legion and undisputed that the parties had an extravagant lifestyle, lived beyond their means, and that the children participated in that lifestyle right along with the parents." Appellee's Brief at 18. Ms. Black argues that the parties' extravagant lifestyle is sufficient to justify an award of child support which exceeds the highest level of the statutory guidelines. Ms. Black cites this Court's decision in Ostler v. Ostler, 789 P.2d 713 (Utah App. 1993), as providing the "accepted definition of need." Appellee's Brief at 18. Notably, both Ostler and Peterson v. Peterson, 748 P.2d 593 (Utah App. 1988) (the citation omitted from Appellee's Brief at 18), were decided prior to the implementation of the

statutory child support guidelines. Moreover, neither of these cases attempted to define "need." In Ostler, this Court vacated and remanded the child support award based on the failure of the trial court to make specific factual findings regarding child support and the trial court's failure to apply those factors in making a modified child support award. In Peterson, this Court reversed and remanded the trial court's award of child support which was based upon the unemployment income of the payor spouse.

If a trial court awards child support at a higher level then that provided by the statutory child support guidelines then the trial court is required to make specific findings that the child(ren)'s needs support the award. A general reference to the parties extravagant lifestyle and a statement that the children shared in that lifestyle, which was found to be unsustainable, is insufficient to support a deviation from the statutory guidelines. "Rather a trial judge must consider and make specific findings on all 'appropriate and just' facts." Ball v. Peterson, 912 P.2d 1006, 1014 (Utah Ct. App 1996). The trial court did not make such findings because no evidence was introduced, nor does any exist, which would support a need for child support greater than the statutory child support guidelines. In that no quantitative evidence was introduced at trial, it is impossible to marshal any evidence to support the trial court's vague, qualitative findings of fact.

III.

THE TRIAL COURT CONSIDERED THE DENTAL PRACTICE A MARITAL ASSET

Confusingly, Ms. Black argues that "Mr. Barney's business should be considered an asset of the martial estate." Appellee's Brief at 20. In fact, the trial court did concluded that the dental practice was a marital asset. In paragraphs 4, 6, and 7 of its findings, the trial court states:

> 4. The court finds that the tangible assets of the Respondent's dental practice are marital property.
>
> 6. The dental equipment has a current value of forty thousand dollars ($40,000). This is the value assigned to the equipment by Respondent.
>
> 7. The present value of the dental equipment assets of the dental practice should be evenly divided between the parties; twenty thousand ($20,000) to each party.

R. 840

The trial court specifically found that the accounts payable were equal in value to the accounts receivable and therefore the equipment constituted the only business-related asset with any value to be considered. R. 840. The trial court also recognized, correctly, that the Utah Supreme Court's decision in Sorenson v. Sorenson, 839 P.2d 774 (Utah 1992), does not permit the valuation of a sole practitioner's practice unless the professional has

retired and sold the practice. See id. The dental practice was considered a marital asset under the applicable Utah law.

CONCLUSION

Based on the foregoing, Mr. Barney respectfully requests this Court to order that (i) Ms. Black's alimony award terminate on remarriage; (ii) child support be awarded at the highest statutory table amount; and (iii) the judgments in the amounts of $8,000.00 and $20,000.00, entered as a part of the property division of the trial court, be vacated.

DATED: July 10, 2000

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2000, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed, postage prepaid, first-class, to:

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